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No. 86-953

In the Supreme Court of the United States

OCTOBER TERM, 1986

RANDY W.J. ABELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether certain offenses charged against petitioner—sexual assaults on the dependent children of fellow servicemen—had a sufficient connection with the military to empower a court-martial to try him for those offenses.

2. Whether the military and civilian prohibitions against the sexual abuse of children gave petitioner sufficient notice that the conduct charged against him was criminal.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-12a) is reported at 23 M.J. 99. The opinion of the Army Court of Military Review (Pet. App. 13a-15a) is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on November 10, 1986 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

STATEMENT

A general court-martial was convened by the Commander of the United States Army Aviation Center at Fort Rucker, Alabama, to try petitioner on three specifications of indecent acts with children under the age of 16, in violation of Article 134 of the Uniform Code of Military

Justice (UCMJ), 10 U.S.C. 934. At a pretrial hearing, the trial judge granted petitioner's motion to dismiss the specifications (Tr. 52; Pet. App. 2a-6a). Pursuant to Article 62, UCMJ, 10 U.S.C. (Supp. II) 862, the government appealed that decision to the Army Court of Military Review, which reversed the trial court's judgment and reinstated the specifications (Pet. App. 13a-15a). Petitioner thereafter sought review by the Court of Military Appeals, which granted review and affirmed the judgment of the Army Court of Military Review (Pet. App. 1a-12a). After the Court of Military Appeals denied petitioner's request for a stay of his trial, the court-martial reconvened on April 11, 1986, and petitioner was convicted on two of the three specifications. He was sentenced to confinement for 30 months, a reduction in rank, forfeiture of all pay, and a dishonorable discharge (*id.* at 2a). The convening authority subsequently approved the findings and sentence. Petitioner's appeal from his conviction is currently pending before the Army Court of Military Review.

1. From 1983 to 1986, petitioner, a military air traffic control tower operator, was stationed at Fort Rucker, Alabama, where he served as an instructor at the Army Aviation Center (DX G). The offenses at issue in this case occurred in petitioner's trailer home in an off-post trailer park between May and June 1985 (Pet. App. 3a; GX 2). Although it was not on military property, the trailer park was immediately adjacent to Fort Rucker. Approximately 80% of the trailer park residents were soldiers or their dependents (Pet. App. 3a, 7a, 10a, 14a; Tr. 18-19).

Petitioner's victims were two young girls, eight and nine years of age at the time the offenses occurred. One girl lived in the trailer park with her mother and her step-father, who was on active duty attending flight school at Fort Rucker (Tr. 85). The other girl lived with her mother in the same trailer park while her step-father was on a tour of duty in Korea (Pet. App. 6a, 11a; AX 2). Both victims were

friends of petitioner's daughter and frequently visited her at petitioner's trailer (Pet. App. 3a; GX 2; Tr. 85). Petitioner was also responsible, on occasion, for baby-sitting one of the victims (Tr. 86). During these visits, petitioner committed numerous acts of sexual abuse on the victims (GX 2). This pattern of abuse continued over a three-month period until petitioner's conduct was reported to civilian authorities (Pet. App. 3a-4a; Tr. 32).

In 1985, both victims and their families left Fort Rucker pursuant to military orders reassigning them to military installations in Washington and Texas. In October 1985, the local district attorney's office informed the Army that, in light of the geographic location of the victims and their families, it would defer prosecution of petitioner to the Army (Pet. App. 4a; AX 2, encl. 1).[1] Three days later, the Army charged petitioner with the child abuse offenses (Tr. 21).

2. a. Before trial, petitioner moved to dismiss the specifications on the ground that the court-martial lacked jurisdiction over the offenses under *Relford* v. *Commandant*, 401 U.S. 355 (1971). The judge conducted an evidentiary hearing on the motion. Evidence was introduced regarding the off-post housing situation at Fort Rucker, which showed that service-members were authorized to live at the trailer court where petitioner and the victims lived (Tr. 15-16). Evidence was also adduced concerning the inability of the district attorney's office to bring petitioner to trial in civilian court, because the district attorney lacked the subpoena power necessary to compel the victims to return to Alabama (Tr. 22; GX 1). For petitioner to be tried in the local criminal courts, the evidence showed, the victims and their families would have to pay their own travel and lodging expenses for the grand jury and trial proceedings (GX 1).

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[1] The letter from the district attorney's office and a stipulation of expected testimony from the assistant district attorney were introduced during the hearing on petitioner's motion (GX 1).

b. After hearing the evidence, the trial judge granted petitioner's motion to dismiss and entered findings on the matter (Pet. App. 2a-6a). The court ruled that the offenses were not "service connected" because there was no military relationship between petitioner and the victims' fathers (*e.g.*, they were not members of the same unit and did not perform their military duties together); because there was no on-post "contact" or "activity" between petitioner and his victims; and because there were no charges against petitioner stemming from on-base conduct (Pet. App. 5a-6a; Tr. 51-52).[2]

3. On the government's appeal, the Army Court of Military Review reversed the trial court's judgment and reinstated the charges (Pet. App. 13a-15a). In concluding that the offenses were "service connected," the Court of Military Review noted several factors: the offenses occurred in close proximity to Fort Rucker; the victims were military dependents; petitioner and the victims resided in the same trailer park; and the trailer park primarily served military families from the base. Relying on the Court of Military Appeals' decision in *United States* v. *Solorio*,

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[2] Notably, however, the trial judge stated (Pet. App. 4a-5a; Tr. 50):

> In my opinion, it is a reasonable and logical assumption that the commission of a series of indecent acts by a soldier on the children of other soldiers in his quarters located adjacent to a military installation has a direct, clear and measurable impact on the morale, reputation and integrity of the installation. I believe that it is also reasonable to assume the morale of soldiers and their dependents, particularly those living in the same housing area as an alleged offender would suffer even more if the appropriate civilian or military authorities did not take some action. It is apparent to me that civilian authorities never intended to prosecute Sergeant Abell.

The trial judge did not have the benefit of the Court of Military Appeals' decision in *United States* v. *Solorio*, 21 M.J. 251 (1986), cert. granted, No. 85-1581 (June 16, 1986), which was published 13 days after the trial judge's ruling.

21 M.J. 251 (1986), cert. granted, No. 85-1581 (June 16, 1986), the Court of Military Review ruled that petitioner could be court-martialed for the alleged offenses (Pet. App. 15a).

4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also found that the offenses were "service connected" (Pet. App. 1a-12a). At the outset, the court held that the question whether a particular crime is "service connected" is subject to de novo consideration by an appellate court (*id.* at 8a). The court explained that analyzing the factors identified in *Relford* and *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), requires a "considered judgment, not mathematical calibration" (Pet. App. 11a). In ruling that the offenses charged against petitioner could be tried by court-martial, the court of appeals relied on a number of factors (*id.* at 10a-11a): the crimes occurred immediately adjacent to a military installation; the civilian authorities deferred prosecution of petitioner to the military; and the sexual abuse of the dependent children of fellow servicemembers has a "clearly deleterious" effect on the military performance of the servicemember parents and on military morale and cohesiveness. Considering these factors in light of *O'Callahan, Relford, Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), and its recent decision in *Solorio*, the Court of Military Appeals concluded that petitioner's crimes were properly triable by a court-martial (Pet. App. 11a-12a). As the court summarized, "[a]lthough the price of service to one's country is high, these decisions do not dictate that it further include the unreasonable exposure of a soldier's family to unsanctioned crimes committed within the military community by fellow servicemembers" (*ibid*).[3]

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[3] On January 12, 1987, this Court denied petitioner's motion to expedite consideration of the petition and to set the case for argument in tandem with *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).

DISCUSSION

Petitioner contends that the military courts were not authorized to try him for his off-base crimes because the offenses were not "service connected" under *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). Petitioner also argues that trying him before a court-martial violated the Due Process Clause by denying him fair warning that he was subject to prosecution in the military courts.[4] The questions presented in this case are not materially different from the questions in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986). Both cases involve offenses committed against the minor dependents of fellow servicemembers, both cases involve off-base crimes, and both cases involve a decision by civilian authorities to defer prosecution of off-base crimes to the military. The petition in this case should therefore be disposed of in light of the Court's decision in *Solorio*.

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[4] Petitioner did not raise his second claim in either of the courts below. He therefore may not assert it for the first time in this Court. See, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *Solorio* v. *United States*, cert. granted, No. 85-1581 (June 16, 1986).

Respectfully submitted.

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